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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
MAURICE J. SIMON, SR.,  
  
Defendant and Appellant.

C060214  
  
(Super. Ct. No.  
06F03249)

As part of a plea bargain, defendant Maurice J. Simon, Sr., pleaded guilty to six counts of lewd conduct (Pen. Code, § 288, subd. (a)) committed against three boys under the age of 14, and waived a substantial amount of custody credits. In exchange, other charges were dismissed and defendant received the stipulated sentence of 18 years in state prison. The trial court also ordered defendant to submit to an AIDS test.

Defendant timely filed this appeal. His sole contention is that the trial court improperly ordered him to submit to an AIDS test. We disagree.

An AIDS testing order is proper as to a person convicted of lewd conduct "if the court finds that there is probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim[.]" (Pen. Code, § 1202.1, subd. (e)(6)(A).) Such finding must be noted "on the court docket and minute order if one is prepared." (*Id.*, § 1202.1, subd. (e)(6)(B).)

Defendant did not object to the order in the trial court. For this reason, he cannot challenge the trial court's failure to make a specific finding of probable cause and note it in the minutes, as required by statute. (*People v. Stowell* (2003) 31 Cal.4th 1107, 1113-1117.) However, he may challenge the sufficiency of the evidence to support the order, whether or not an objection was lodged in the trial court. (*People v. Butler* (2003) 31 Cal.4th 1119, 1126-1128 (*Butler*).)

For purposes of an AIDS order, the standard of proof is probable cause: "Probable cause is an objective legal standard—in this case, whether the facts known would lead a person of ordinary care and prudence to entertain an honest and strong belief that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim." (*Butler, supra*, 31 Cal.4th at p. 1127; see *People v. Caird* (1998) 63 Cal.App.4th 578, 590.)

The factual basis for the plea shows that defendant lewdly put his finger in the anus of a boy aged 9 (count 1, J.N.), lewdly touched the testicles and buttocks of a boy aged 11 to 12

(counts 2-5, S.H.) and lewdly touched the buttocks of a boy aged 13 (count 6, J.W.).

The probation report described that defendant had been given custody of J.W. and "directed [J.W.] (age 13) to begin kissing him on the mouth and call him dad." Defendant would also kiss J.W. on his neck and shoulders. S.H., who also lived with defendant, reported that "defendant would make him hug and kiss him on the lips before bedtime."

At sentencing, defendant objected to several portions of the probation report, including the portion in which J.W. reported being made to kiss defendant on the mouth, but he did not object to the portion describing defendant making S.H. kiss him on the lips before bedtime. The trial court overruled the objection to the facts about J.W., because even though they reflected uncharged acts, such acts would have been admissible at trial.

On appeal, defendant contends the trial court was limited to considering the factual basis of the plea, and contends there is no evidence "even suggesting a transfer of bodily fluids during any of these activities, all of which consisted of appellant using his hand to touch the victims."

The Attorney General relies in part on the probation report, showing defendant frequently kissed two of the victims, J.W. and S.H., and also notes that defendant slept with J.W. and rubbed his penis against J.W.'s hand, from which he argues "Given the pervasiveness of these contracts, it is reasonable to

conclude that semen from appellant's penis may have come into contact with [J.W.'s] anus."

If the trial court had been limited to the factual basis of the plea, the order would not be sustainable, because we agree with defendant that there is no reason to conclude that the acts described by the factual basis--placing his finger in a boy's anus and fondling the testicles and buttocks of other boys--would normally lead to a transfer of bodily fluids. Nor do we accept the Attorney General's speculation that defendant may have ejaculated on one boy's hand or against his anus: All three boys were old enough to describe what happened and none described any conduct amounting to ejaculation.

We do not agree with defendant's premise that the trial court was limited to the factual basis of the plea. Even if we agreed that the trial court should have sustained defendant's objection to the part of the probation report in which J.W. described being made to kiss defendant, defendant did not object to the part regarding S.H., who said he was made to kiss defendant on the lips at bedtime. Defendant's failure to object to that evidence forfeits any claim that the trial court should not have considered it. (See *People v. Evans* (1983) 141 Cal.App.3d 1019, 1021.)

The issue is whether evidence that defendant regularly made S.H. kiss him on the mouth "would lead a person of ordinary care and prudence to entertain an honest and strong belief that blood, semen, or any other bodily fluid capable of transmitting

HIV has been transferred from the defendant to the victim."

(*Butler, supra*, 31 Cal.4th at p. 1127.)

In *People v. Guardado* (1995) 40 Cal.App.4th 757, the court construed a related statute that required a request by the victim for an AIDS test. (Former Health & Saf. Code, § 199.96, renumbered without substantive change as current Health & Saf. Code, § 121055; see 1 Witkin & Epstein, Cal. Criminal Law (3d. ed. 2000) Introduction to Crimes, §§ 113-114, pp. 171-176 [discussing overlapping AIDS testing statutes].) In dicta, the court stated that the evidence "could have" supported a finding of probable cause, and the only act described in the case that suggests a transfer of bodily fluids was a "'French'" kiss. (*Guardado*, at pp. 761-762, 765.)

A "French" kiss involves penetrating the mouth with the tongue, which would normally transfer saliva. Although a kiss on the lips does not necessarily transfer saliva, as with a French kiss, it can easily do so. The trial court could rationally conclude that the fact defendant--a man who clearly acted with lewd intent towards boys--regularly kissed S.H. on the lips at bedtime supports an "honest and strong belief" that saliva, a bodily fluid that can transmit the AIDS virus, was "transferred from the defendant to the victim." (*Butler, supra*, 31 Cal.4th at p. 1127.)

Accordingly, we conclude that the AIDS testing order is supported by the record.

## DISPOSITION

The judgment is affirmed.

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HULL, J.

We concur:

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BLEASE, Acting P. J.

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BUTZ, J.